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No. 83-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES CONNORS KARO, *et al.*,

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF FOR RESPONDENT RHODES

ROGER BARGAS
BARGAS and ZVOLANEK
601 Tijeras N.W., Suite 200
Albuquerque, New Mexico 87102
(505) 247-0717

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STATEMENT

The court of appeals held that respondent Rhodes failed to establish that the beeper was monitored in any place in which he had a legitimate expectation of privacy, and that he did not establish any possessory interest in the ether violated by the installation of the beeper. Pet. App. 14a-15a. Accordingly, the court reversed the district court's suppression of evidence as to Rhodes. Rhodes filed a cross-petition for writ of certiorari with this Court which was docketed on December 27, 1983 as No. 83-5982 claiming that the court of appeals erred by reversing the trial court's determination that he had standing to raise a Fourth Amendment claim, and erred further by failing to address the issue of supervisory control raised below.

Rhodes' apparent involvement in this case starts on February 6, 1981, when DEA agents, monitoring a closed circuit video camera focused on the door of the second self-storage facility in Albuquerque, observed Rhodes and an unidentified woman remove the cans of ether and load them into a pickup truck. Using both visual and beeper surveillance, agents followed the truck to Rhodes' residence. The agents were unable to determine if the beeper was inside Rhodes' residence. The record is not clear, but it seems that the agents concluded that the beeper never entered the Rhodes residence because they observed Rhodes bring boxes and other items, but no ether cans, from inside the house and load them into another vehicle. J.A. 56-57.[1] The record does not establish how long the pickup truck was parked at the residence, nor does it establish the amount of time that passed during the break in the visual surveillance subsequent to Rhodes' departure from the storage facility.

Later that day, DEA agents, again using both visual and beeper surveillance, followed Rhodes as he drove the pickup truck containing the ether cans to the Taos residence. Rhodes spent the night in the Taos residence and left the following day. H. Tr. 315. Using the beeper locater, the government agents were able to positively

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[1] The affidavit for the search of the Taos residence mistakenly identifies respondent Horton as the person who took the beeper-laden ether can from the second storage locker when it fact it was respondent Rhodes. The agents later acknowledged this error and testified that it was Rhodes who loaded the pickup truck and drove it to his residence and later to Taos. J.A. 90-94, 96-97, 110-111.

The government's brief misleads the Court by indicating that the agents had no difficulty observing Rhodes remove the cans and load them into the pickup. Pet. Brief 27-28 f.n. 12.

This continuing confusion on the part of the government may explain the court of appeals' error in holding that Rhodes never had a possessory interest in the ether can.

pinpoint the beeper signal as emanating from the Taos residence the evening of February 6th and again on February 7th. J.A. 57-58. The agents observed that windows and doors in the house were open on February 7th, even-though it was a cold and windy day, and surmised that the ether was being opened and used and not simply stored on that date. J.A. 58-61.

SUMMARY OF ARGUMENT

Respondent Rhodes, through his attorney, has consulted with counsel for all co-respondents, and has reviewed the briefs that will be submitted on their behalf. In the interest of judicial economy, and in order to avoid duplicitous and unnecessary pleadings, respondent Rhodes hereby adopts the briefs of all co-respondents and incorporates the arguments and authorities by reference. This brief is submitted solely to focus on facts and circumstances unique to Rhodes and is therefore only supplemental.

Rhodes submits that his reasonable expectation of privacy was violated on at least two occasions: 1) When he took possession of the beeper-laden ether can; and, 2) When the beeper was monitored in the vicinity of his residence and when the agents pinponited the beeper signal emanating from the Taos residence during his overnight stay on February 6th and 7th.

I. The Warrantless Installation Of The Beeper Violated Rhodes' Fourth Amendment Rights When He Took Possession Of The Beeper-Laden Container.

The court of appeals held that Karo had a right to own and possess the ether can without the illegally installed beeper and that the evidence seized at the Taos residence was tainted by the illegal installation. This holding, if consistently applied, should apply with equal force to respondent Rhodes.

It is uncontradicted that Rhodes took possession of the ether can. He picked it up from a locked self-storage facility to which he had a key. J.A. 153. He drove the pickup truck containing the beeper-laden can to his residence and then to the house in Taos.

The only apparent distinction between Karo and Rhodes, regarding the installation issue, is that Karo had both a possessory and proprietary interest in the ether while Rhodes only had a possessory interest. This Court has rejected the application of arcane distinctions, evolved in property law, to Fourth Amendment issues. *Rawlings* v. *Kentucky*, 448 U.S. 98, at 105 (1980). Rhodes was a bailee of the ether can with full control over its movement. There is no constitutionally significant difference between a lawful bailee of an object and the lawful owner. Both have a reasonable expectation that containers coming into their possession have not been opened and bugged by the government.

II. The Warrantless Monitoring Of The Beeper In The Vicinity Of Rhodes' Residence And During His Stay At The Taos Residence Violates The Fourth Amendment.

The government's most significant piece of evidence against Rhodes was developed by monitoring the beeper within the Taos residence following his delivery of the ether cans. After Rhodes drove the pickup truck containing the cans to Taos, the government agents were able to pinpoint the beeper signal as emanating from within the residence. J.A. 57-58. During this time the agents observed that the windows and doors of the residence were open despite the inclement weather. This observation, coupled with the information that the can was within the residence, led the agents to the conclusion that the ether was being opened and used and not simply stored. J.A.

61. The monitoring and observation occurred at a time when Rhodes was an overnight guest within the house. H. Tr. 315.

The monitoring of the beeper while Rhodes was an overnight guest in the Taos residence puts him in a much different position than the defendants in *United States* v. *Knotts*, No. 81-1802 (March 2, 1983). In *Knotts*, there was nothing in the record to indicate that the beeper signal was monitored after the drum ended its journey to Knotts' cabin.

This Court extended the constitutional expectation of privacy within a residence to invitees as well as home owners. See *Alderman* v. *United States*, 394 U.S. 165, at 179 n.11 (1969). Realistically, this Court recognized that most of society expects that when they are guests in someone's home they will be free of unwarranted intrusions.

Prior to driving to the Taos residence, Rhodes drove the pickup truck with the beeper-laden container to his residence. The agents were unable to determine whether the beeper actually went into the four walls of his residence or not. The agents presumed it did not because once they regained visual surveillance of the truck and residence they observed Rhodes and a woman removing objects, but no ether cans, from the house. J.A. 57. This conclusion fails to acknowledge that the record is silent on how much time passed after the agent lost visual contact with the truck and picked it up again at Rhodes' residence. It is left to speculation whether the time span was so short that it was impossible or improbable that Rhodes and his companion prudently moved the ether can into his residence and out again before the agents regained visual surveillance.

The fact that the beeper was monitored within a house where Rhodes was staying as an invitee, and may have been monitored in his own residence, places him in a much different position that Petschen, the person who merely transported the chloroform in the *Knotts* case. Rhodes' constitutionally recognized expectation of privacy was violated by the warrantless beeper monitoring and the trial court correctly suppressed the evidence as to him.

CONCLUSION

The judgment of the court of appeals should be affirmed, and modified to include respondent Rhodes in its affirmance of the trial court's suppression order.

Respectfully submitted,

ROGER BARGAS
BARGAS and ZVOLANEK
601 Tijeras N.W., Suite 200
Albuquerque, New Mexico 87102
(505) 247-0717
Attorney for Respondent Rhodes